

## Proportionality of fines

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Bundeskartellamt

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# Legal background

## A short history of fining laws in Germany

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Until 2005

- Fine up to three times the additional proceeds
- Economic benefit can be skimmed off on top of the fine

13 July  
2005

- Introduction of the 10% total turnover threshold of Reg. 1/03 into our law with the 7<sup>th</sup> reform of the German Competition Act
- Economic benefit can still be skimmed off on top of the fine

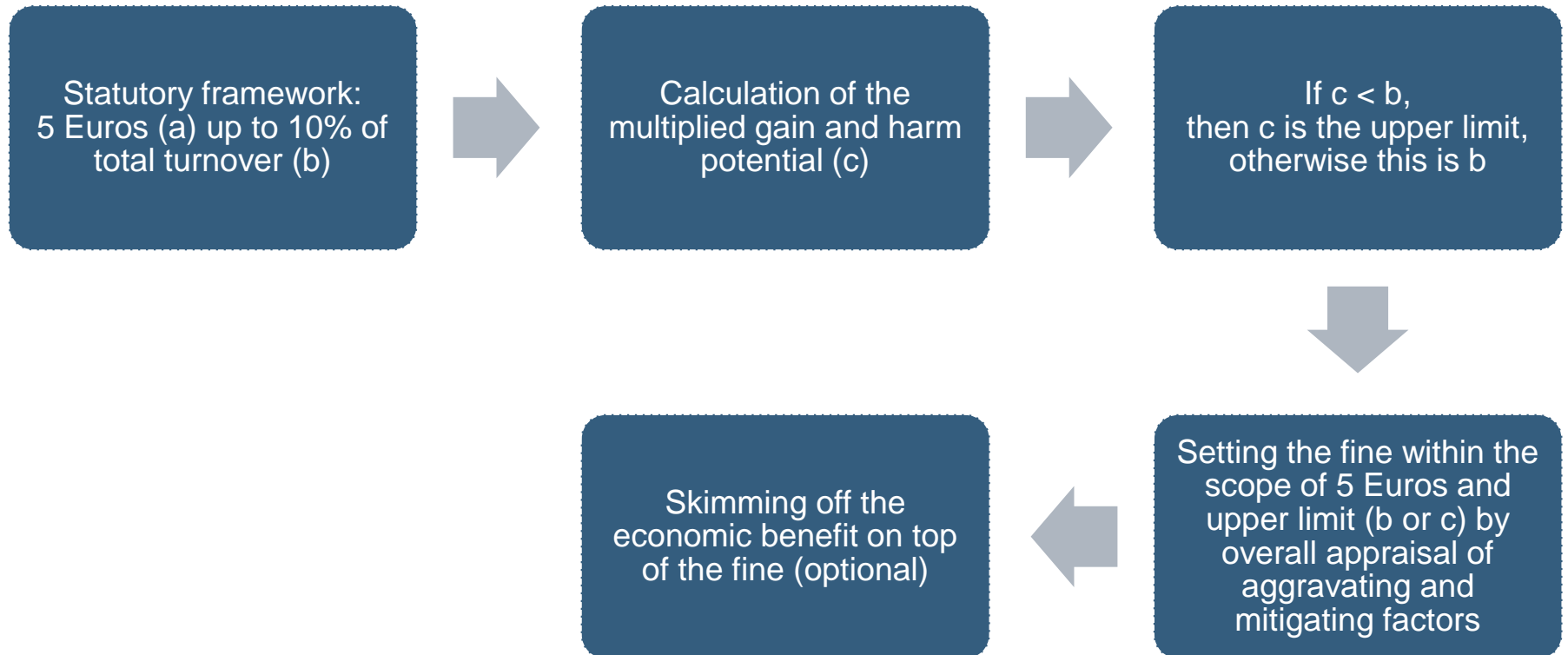
26 February  
2013

- Federal Court of Justice: 10% is no capping threshold but an upper limit
- A capping threshold would be incompatible with our constitution

# Legal background

## The five steps of the BKartA's 2013 fining guidelines

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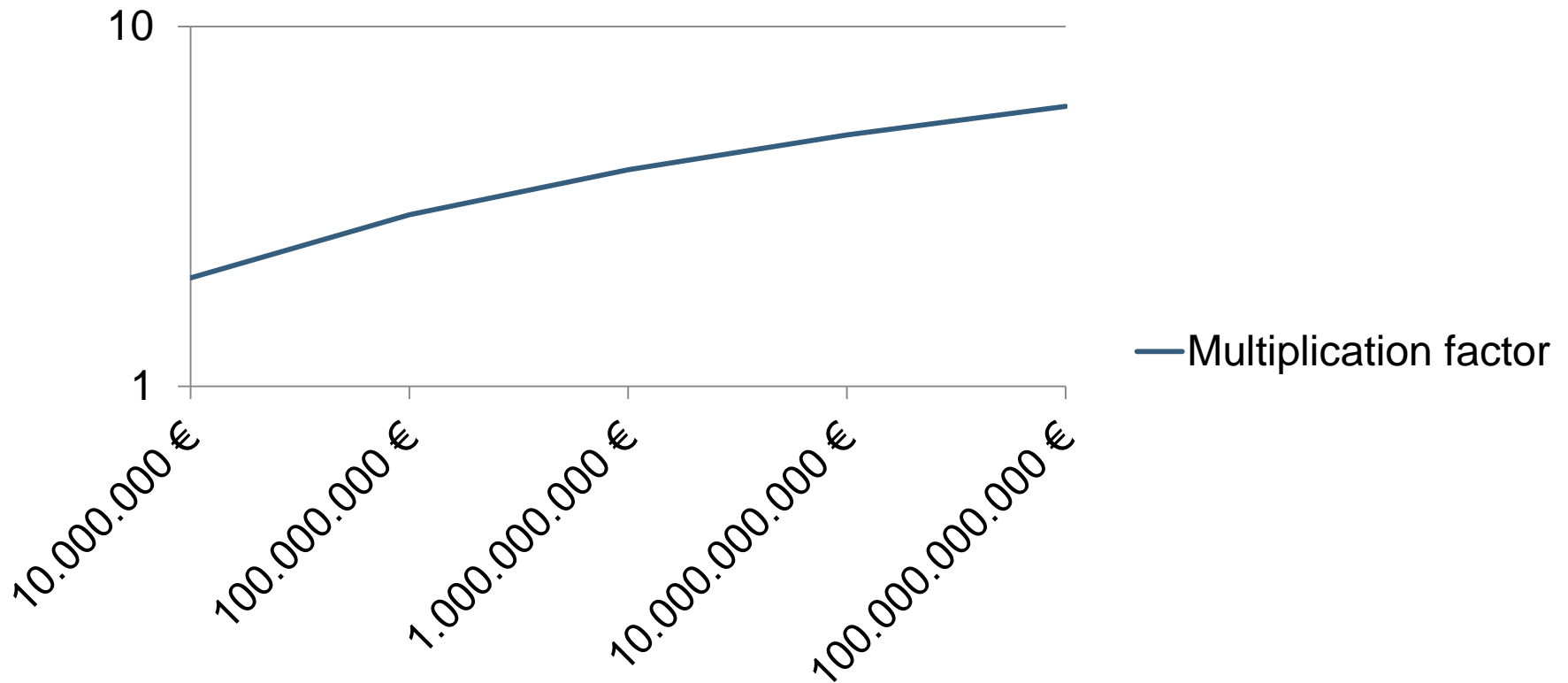


# Legal background

## The five steps of the BKartA's 2013 fining guidelines

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### Multiplication factor



# Legal background

## The view of the courts

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- In Germany, the Higher Regional Court Düsseldorf does not review the decisions of the BKartA, but it makes its own decisions.
- So far, there are still very few cases decided by the Higher Regional Court Düsseldorf and even less by the Federal Court of Justice.  
Reasons:
  - At first, some old cases congested the pipeline.
  - Most of the BKartA's cases have been settled since 2007.
  - Many appeals have been withdrawn for fear of higher fines.
- The cases cement (2009), liquefied gas (2013) and coffee (2014) together with some preliminary assessments of the Higher Regional Court Düsseldorf offer only a few indications of the court's thinking:
  - The discretion in setting fines is broad.
  - The court is not bound by BKartA's fining guidelines and does not apply them.
  - The relevant turnover may be one criteria, but it is only one among others.

# Proportionality of fines

## A definition of proportionality

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A measure is proportionate under four conditions:

- There must be a legitimate aim for a measure.
- The measure must be suitable to achieve the aim.
- The measure must be necessary to achieve the aim.
- The measure must be reasonable.

Sanctions in competition law have two main objectives:

- deterrence and
- repression.

To achieve these objectives a sanction must at least take away the financial gains by considering

- the expected gains from the cartel (cartel overcharges) and
- the probability of detection.

# Proportionality of fines

## A definition of proportionality

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### Analysis of price-fixing overcharges:

Werden (13 cartels after 1974):  
21% median.

OECD (12 cartels 2001/2):  
15,75% median.

Connor (Meta-Analysis of 674 cartels after 1770):  
25% median overcharge for all cartels (18% domestic and 32% international cartels).

JFTC (analysis of surcharge cases):  
16,5% average, at least 8%.



Data show: at least 15% median cartel overcharges.



# Proportionality of fines

## A definition of proportionality

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Analysis of probability of detection (more difficult to assess as cartels are secret):

Bryant/Eckard (184 cartels before 1988): estimation of detection between 13 and 17%.

Probability of detection seems to have increased a lot after the introduction of leniency programmes and the global move to impose much higher fines.



No close-to-reality figures available.

# Proportionality of fines

## The BKartA's 2013 fining guidelines

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### Expected gains

- Gain and harm potential: 10% of relevant turnover
- Economic benefit can be skimmed off on top of the fine

### Probability of detection

- Multiplication factor from at least 2 to more than 6 depending on the size of the company

# Proportionality of fines

The level of fines in general

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## too high?

- No company ever went bankrupt because of the fines imposed to it.
- In cases of financial difficulties it is always and at any time possible to ask for a payment deadline or specified instalments.

## too low?

- It is impossible to sanction single product companies exclusively active in a domestic market adequately.
- Even the possibility to skim off the economic benefit is no compensation for this.

# Proportionality of fines

## Fines for companies participating in the same infringement

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A not completely fictional case example:

Company	Total turnover	Relevant turnover	Upper limit
A	11 billion Euros	1.2 billion Euros	600 million Euros
B	9 billion Euros	330 million Euros	160 million Euros
C	700 million Euros	1.2 billion Euros	70 million Euros
D	550 million Euros	1 billion Euros	55 million euros
E	520 million Euros	270 million Euros	52 million Euros
F	420 million Euros	320 million Euros	42 million Euros
G	60 million Euros	60 million Euros	6 million Euros
H	54 million Euros	110 million Euros	5,4 million euros
I	14 million Euros	24 million Euros	1.4 million Euros

# Proportionality of fines

## Fines for different infringements

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### Cartels

- BKartA's 2013 fining guidelines: The fine will usually be set in the upper range within the scope of 5 Euros and upper limit (at least 50% of the upper limit).
- In practice, there is a broad range of fines between less than 50% and more than 80% of the upper limit (before leniency and settlement reductions).

### Resale price maintenance

- There is no explicit provision in the BKartA's 2013 fining guidelines.
- In practice, there is a range of fines between less than 50% (35% is the lowest percentage) and more than 50% (in a few cases) of the upper limit.

### Others

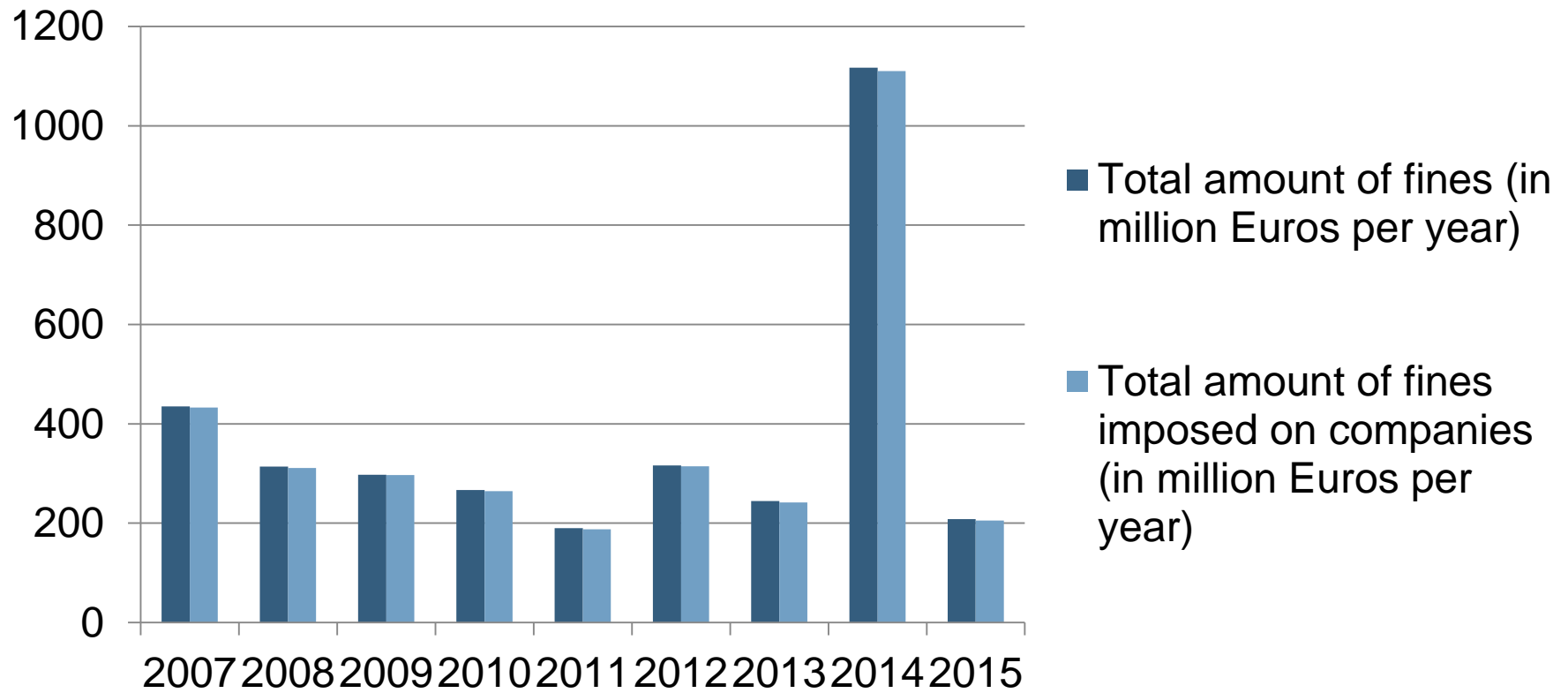
- The BKartA's 2013 fining guidelines do not apply to offences in the area of merger control.
- Since June 2013 there has been only one case where the BKartA imposed a fine for other infringements.

# Proportionality of fines

## Development of fines over time

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### Total amount of fines

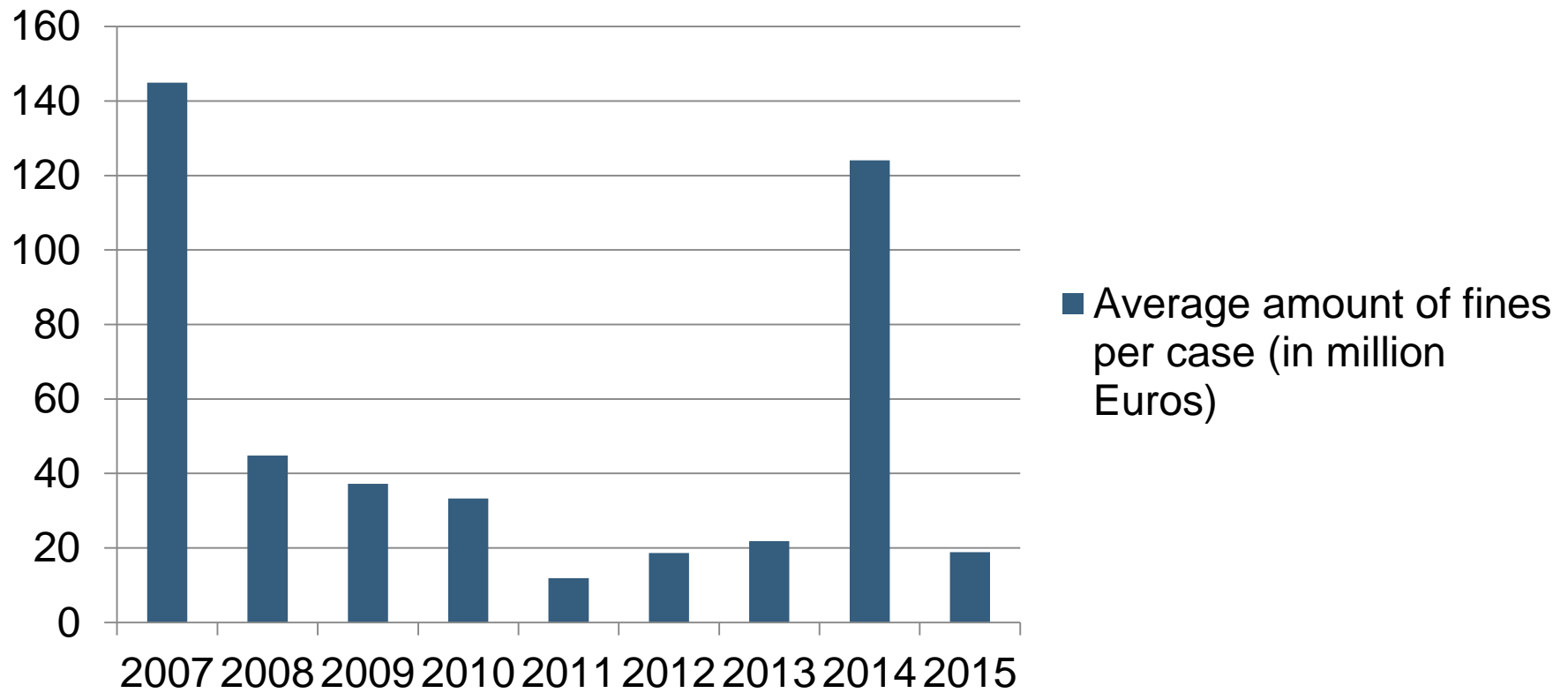


# Proportionality of fines

## Development of fines over time

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### Average amount of fines per case

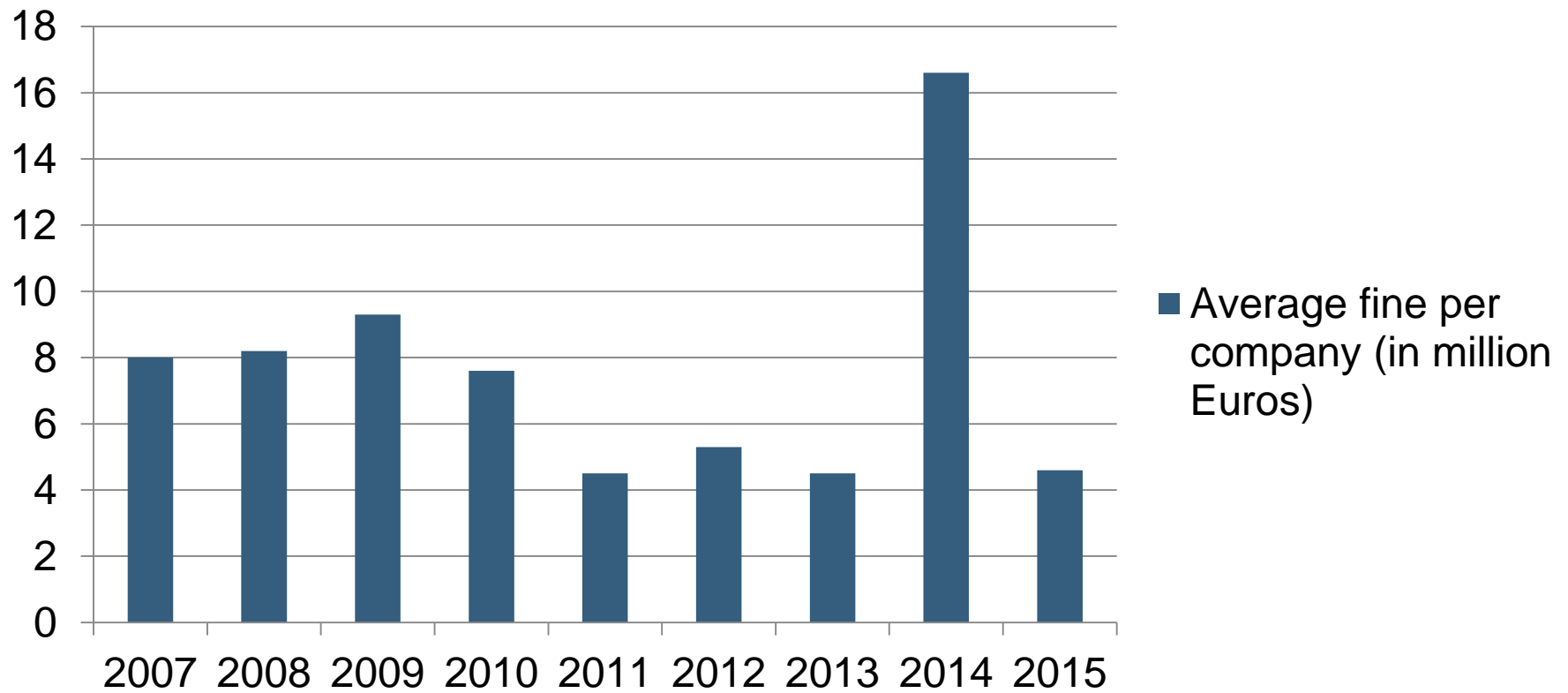


# Proportionality of fines

## Development of fines over time

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### Average fine per company



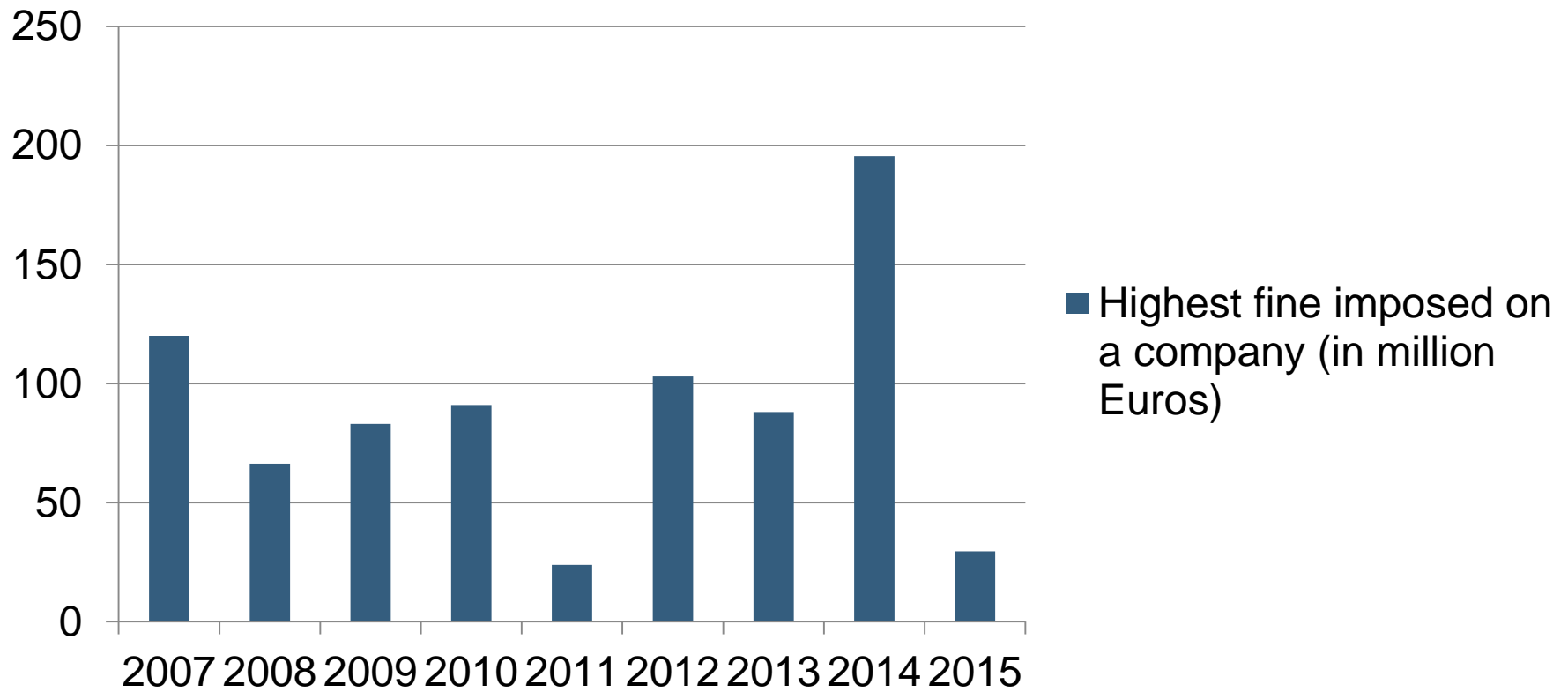


# Proportionality of fines

## Development of fines over time

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### Highest fine imposed on a company



# Questions?

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